United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1134 B no service

Docket No. 76-1134

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA

Appellee-Plaintiff

-vs-

EDWARD CARLTON

Appellant-Defendant

BRIEF FOR THE APPELLANT EDWARD CARLTON

On appeal from the United States District Court for the Western District of New York

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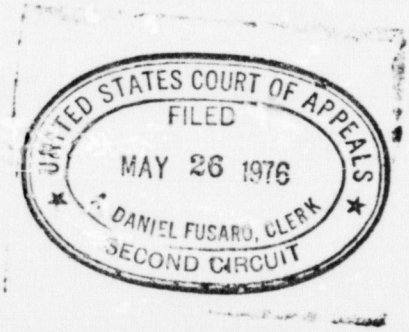

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STATUTES INVOLVED

28 U.S.C. Rule 609(a)

Impeachment by Evidence of Convictions of a Crime

For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross examination but only if the crime 1) was punishable by death or imprisonment in excess of one year under the law which he was convicted, and the Court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or 2) involved dishonesty or false statement, regardless of the punishment.

PRELIMINARY STATEMENT

Appellant Edward Carlton was arrested on February 4, 1975 and charged with bank larceny. He was indicted by a Federal Grand Jury on the 6th day of February in a five count indictment with two co-defendants; the indictment alleging five separate counts. After various motions to suppress and dismiss were argued and denied by the Hon John T. Curtin, Federal District Court Judge for the Western District of New York, trial commenced on January 22, 1976 and ended when the jury reported that it could not reach a verdict. The Court thereupon discharged the jury. A retrial commenced February 24, 1976 and

ended on March 1, 1976 with the jury reporting guilty verdicts against the defendant Carlton. The two co-defendants had previously pled guilty to various charges and had promised to cooperate with the Government if necessary, one having testified against the Appellant during trial.

Appellant was sentenced on March 15, 1976 to a term of imprisonment for up to ten years on three counts and a term of five years on the conspiracy county, the sentences being ordered to run concurrently.

A notice of appeal was filed on March 15, 1976, the date of sentence.

STATEMENT OF FACTS

Appellant Carlton during the pendency of the action brought, through counsel and pro se various motions, including: a) a motion to suppress certain tangible evidence; b) a motion to suppress oral statements; c) a motion to preclude cross examination of appellant as to certain previous convictions; d) a motion for a mistrial because of custodial viewing by members of the jury; e) a motion to

dismiss for failure to give appellant a speedy trial. In each case the motion was denied.

The facts upon which the motions were based are as follows:**

During the suppression hearing a tape of a Niagara Falls Police Department radio revealed that on February 4, 1975 at 10:54 A.M. a broadcast was transmitted that there had been an alarm at Manufacturers and Traders Bank located at Portage Road and East Falls, and that a robbery had been committed by individuals who fled in a blue car, plate number 673 ZAX, last seen headed north between 13th and 14th Streets. The report stated that the car was occupied by two colored males. It was not determined whether any weapons were used.

At 11:03 A.M. the radio rebroadcast that two Negro males were in the car identified as a 1975 white over blue Dodge.

The next broadcast was somewhat different, stating that a Negro male and Negro female were involved. The male was described as using a ski mask, wearing black pants and a dark colored pea coat possibly black or navy blue. He was further described as being tall and slender.

At 11:05 A.M. police radioed that "that car used was

**Letters and numbers designated by S refer to suppression hearing and numbers designated T rerer to transcript of trial.

involved was alleged to have been just left there (13th Street School)." The female involved was alleged to have been wearing a long plaid coat and red slacks, being in her late teens, early twenties and was "light skinned." The vehicle was now claimed to be a 1975 Plymouth.

At 11:05 A.M. the radio further broadcast that two parties from the Gas Company saw three individuals heading north on 13th Street toward Niagara Street and lost sight of them there. The third party was claimed to be a woman about five foot three, heavy set, wearing a checkered coat and in her early twenties. The next transmission stated a different set of facts; that the third woman was seen walking alone up 13th Street toward Niagara Street and then west on Niagara Street.

Niagara Falls Police Officer Robert Gee testified at the hearing that at approximately 11:25 A.M. he observed a local taxi cab travelling approximately 55 miles per hour (S-231) and approach the intersection of Pine Avenue and 56th Street. In the back seat he testified he observed a heavy set Negro female male, a thinner built Negro female and a Negro male. He followed the cab and observed the individuals turn aroun and look in his direction(S-232). He pulled the cab over on 80th Street and Pine Avenue, the cab having travelled at a normal rate of speed.

Officer Gee ordered the driver out of the vehicle (S-234) and was advised that the passengers were picked up earlier in the 300 block of 14th Street. During the conversation he observed that the occupants of the cab made no attempt to flee the cab, but rather stayed in the cab while he spoke with the cab driver some two car lengths behind the cab. (S-234, 301).

By that time officer Gee had been joined by a number of other police vehicles who surrounded the cab. Officer Gee walked to the cab and asked the Negro male to exit, asked him for identification and was told that he had none. (S-236). The females were removed from the cab by the other officers. At the time the officer noticed that the Negro male was not wearing a dark pea coat as had been broadcast (S-302-303) and further stated he could not remember what the Negro females were wearing (S-303), except that they were not wearing red slacks.

Once the male was removed from the cab he was placed in custody, frisked and handcuffed. (S-304, 306). The record does not reveal any further conversation with the individuals at the scene. Nothing was found on the male's person (S-304). The females had likewise been removed from the cab and moved toward a police car. The male was taken to the rear of the cab toward Officer Gee's vehicle. (S-305).

Officer Gee approached the cab as the male was removed away from the vehicle and the females were taken toward the curb (S-306). He recalled that the handcuff procedures used that day were behind the prisoner's back (S-307) pursuant to departmental rules.

Officer Gee and a Deputy Burek decided to search the vehicle while the occupants were held by the other officers (S-308). Both officers entered the cab at the same time. Officer Gee first noticed a plastic bag on the rear seat containing articles of clothing. A later inventory revealed that none of the clothing described to have been worn by the robbers during the course of the bank robbery were contained in the bag. (S-309, 310).

Officer Gee noticed an attache case on the floor of the cab. He stated that he had heard nother regarding a attache case as it related to the bank robbery. (S-310). In fact the radio transmission had indicated that the individuals were carrying only a brown paper bag. (See transcript of broadcast, P.6).

Without further questioning the individuals, Officer Gee and Deputy Burek picked up the attache case in the cab and immediately proceeded to open it, (S-313) finding money inside (S-314).

Niagara Falls Detective John Zaccarella testified that once the individuals were taken to police headquarters he had

a conversation with one of the girls who had been arrested, Sandra Soles, who told him at headquarters where the robbery had been planned, which, the police surmised, was on 14th Street. They returned to the area which they thought to be the house. Detective Charles Ahart testified that Soles had stated that they had "changed clothes and disposed of the gun" at the house (S-103). Soles pointed out what she felt to be the house on 14th Street, the location being 320 14th Street. (S-109)

Shortly thereafter, Detective Zaccarella, without any particularized knowledge of where any items would be found, entered the house without a search warrant, walked down the basement stairs and observed in the basement a garbage bag. He stated that Soles had stated earlier that Edward Carlton had place some clothes into a garbage bag but that she did not know what happened to the bag. (S-209).

Detective Zaccarella, once in the basement, saw a full garbage bag with something red inside. He stated that when he first saw the bag he could not determine that there were any blue coats or red slacks inside (S-217). He kicked the bag to break it open and found a weapon determined to have been used during the bank robbery, and various other items of clothing admitted into evidence during the trial of this indictment. (S-212)

August Enman, the owner of the apartment house wherein the search was conducted, testified that he had rented one of the apartments to Dorothy Goldsmith, later determined to have participated in the bank robbery. He stated that the tenants were each entitled to the use of the basement as aprt of the terms of the lease. He stated that beside himself, the basement was not for the common use or access to anyone else other than the tenants of the apartment house (S-201). Testimony revealed that garbage, however, was normally left in the rear of the house by the alley. (S-189).

Special Agent for the FBI Alan Davison testified that he went to the bank which had been robbed. He advised the defendants, after they had been returned to the bank, of their Miranda rights at the bank after their arrest. Sometime later, after defendant Carlton had been taken back to the Buffalo Office for the FBI, Carlton was placed in an interview room (S-51). After advising the defendant of his rights, Agent DAvison asked Carlton if he was willing to talk about his involvement in the bank robbery and was told by Carlton, "I ain"t got nothing to talk about." When he refused to make a statement or sign the waiver of rights portion of the form all questioning ceased at 1:31 P.M. (S-52). Agent Davison later testified that he understood the defendant to mean that he did not wish to tald with him (S-79). At that point Agent

Davison stated he did not determine whether Carlton wished to have assistance of counsel (S-82). Agent Davison further stated that he understood Carlton's answer to mean that he did not wish to waive his various rights (S-83).

Agent J. Gary Di Laura testified that at an unspecified time (he could not remember the time) he was asked to sit with Edward Carlton some time after Agents Davison and Kash had concluded their conversation with Carlton. Agent Di Laura testified that he asked Carlton how he was feeling and was told by the defendant he had an upset stomach (S-354). Agent Di Laura then partook in general conversation with Carlton when suddenly Di Laura asked him about the subject of money.

> ...and I asked him, "Well, whose money was in the back of that car, the taxicab, and he said "that was my money," and I said "Well how do youexplain if that was your money ....Oh, I said, I asked him where he got the money. I asked hime where he got the money, excuse me and he said "gambling," I said "How do you explain some of this money is prerecorded bait money from the bank robbery," and he said something to the effect, "Well benk robbery is a gamble." (S-354, 355).

Agent Di Laura went on to ask Carlton to elaborate but was told by Carlton that he did not care to.

Agent Di Laura stated he did not attempt to determine

whether Carlton had been given his rights but stated he felt that Davison must have been reading them to Carlton earlier. Di Laura himself at no time attempted to advise Carlton of his rights. He stated, however, that the questions were asked to invoke a particular response. (S-362).

Prior to trial Defendant Carlton in a pro se motion moved to dismiss the indictment because of the Government's failure to afford him a speedy trial. The motion was filed December 15, 1975. The record indicates that motions before the magistrate with respect to Defendant Carlton were completed on March 18, 1975 with at least one week adjournment granted to the Government. No action was taken before the District Court until August 14, 1975 when the Court heard oral argument with respect to a motion attacking the composition of the Grand Jury. A suppression hearing was scheduled for September 17, whcih was held on various days and concluded October 1, 1975.

A transcript of the hearing was completed on October 30 and defendant's brief ws submitted on December 9. The matter was decided by the Court on January 14, 1976 and the case proceeded to trial on January 22. Defendant's motion for dismissal with respect to a speedy trial was denied on December 29.

Finally, during the trial it was alleged by the defendant that he had been observed by various members of the jury in

a custody condition handcuffed in the custody of the marshall. The Court offered only to charge the jury that the defendant should be presumed innocent, whether in custody or not and took no further steps in this regard. (T-237, 239).

POINT I

THE SEARCH OF THE CAB AND ATTACHE CASE WAS IMPROPER

It is well settled that the validity of an arrest must be determined by the law of the state where the arrest is made. U.S. v. Di Re, 332 U.S. 581; 68 S. Ct. 222 (1948). Additionally, both state and federal cases have held that a stop and search of a moving automobile can be made only upon a showing that the police had sufficient probable cause to stop the vehicle. Almeida-Sanchez v. U.S., 93 S.Ct. 2535, 413 U.S. 266 (1973). Also Henry v. U.S., 361 U.S. 98, 803 S. Ct. 168 (1959). In People v. Cantor, 36 NY2d 106 (1975) the New York State Court of Appeals held that the common law right to inquire does not include the right to unlawfully seize. The Court wrote that depriving the defendant of his freedom of movement amounted to a seizure and could not be effectuated absent a showing of probable cause. (U.S. v Nicholas, 448 F2d 622 (8th Cir., 1971)).

In the instant case no fewer than three different discriptions of the individuals who allegedly took part in the

robbery were broadcast. Not only was there conflict between whether they were males or females, but also there existed discrepencies as to the clothing worn.

The case therefore, represents a classic situation of the ills that the Supreme Court decision of Whitely v. Warden, 91 S. Ct. 1031, 401 U.S. 560 (1971) sought to avoid. In that case the arresting officer, as here, relied entirely upon a police broadcast in stopping a vehicle. The Court determined that the Government did not meet its burden at the suppression hearing because the arresting officer was not himself possessed of any factual data tending to corroborate the information received.

Similarly, in U.S. ex rel Mungo v. LaVallee, 522 F2d 211 (2nd Cir., 1975) a police broadcast indicated a robbery. The police officer stopped a vehicle which met the description and contraband was found. This Court held that the police radio broadcast did not establish probable cause for an arrest and search in that the police officer was not himself possessed of information adequate to support a judicial determination of probable cause. The Court, citing People v. Baldwin, 25 NY2d 66 (1970) held that when the validity of the appellant's arrest was challenged at a pretrial motion to suppress, the Government was obliged to establish probable cause.

Furthermore, as in People v. Lypka, 36 NY2d 210 (1975), this Court ruled that any conclusion that the report to the police

was made by a witness at the scene of the crime would have to be supported by the record. As in the instant case, no proof was offered at the hearing as to the direct information received. Indeed no person from the gas company or the bank was called to testify as to the observations which were broadcast over the police radio.

Neither can the Government seek to uphold the validity of the stop and search as an investigatory stop. Cardwell v. Lewis, 417 U.S. 583, 94 S. Ct. 2464 (1974), holding that while the demands for a permissible search of a vehicle are less stringent than those which obtain in the search of private premises, probable cause must still exist as to the basis for the stop and search.

Nor can the fact of the conduct of the three individuals in the cab add any further justification for the police conduct. The mere fact that they turned around to look at the police car cannot be held to have provided the police with probable cause to search. In U.S. v. Mallides, 473 F2d 859 (9th cir., 1973) the Court wrote that "furtive gestures of looking or not looking back at a police car has been overextended." The Court went further to cite many cases where the Government had contended that not looking back was furtive.

Officer Gee had stated that it was his intent to stop the vehicle with two females and one male. However, in Mallides

the Court held it would be improper for the police to stop cars randomly with the hope of finding something illegal for such action would subject others lawfully using the highway to the inconvenience and indignity of such a search. As in Coolidge v. New Hampshire, 403 U.S. 443 (1971) the initial intrusion must be justified before the validity of the subsequent police conduct could be reached. The information available to the officer, combined with the observations made at the time he stopped the cab were not enough to raise the level of the stop to be based upon probable cause. (See Draper v. U.S., 79 S. Ct. 329, 358 U.S. 307 (1959). Generally U.S. v. Edwards, 469 F2d 1362 (1972).

In Chambers v. Maroney, 399 U.S. 42, 90 S. Ct. 1975 (1970) the Court wrote that probable cause existed where the occupants drove a particular car as well as wore the same clothing as had been described by a number of witnesses. No such particularized information was corroborated by Officer Gee. Here, the contrary is more prevalent. Indeed, in the Court's decision with respect to the instant case, Judge Curtin found at page 9 of his decision,

> In United States ex re. Wilson v. LaVallee, 367 F2d 351 (2 Cir. 1966), United States ex rel. Williams v. LaVallee, 415 F2d 643 (2 Cir, 1969) and in United States ex rel. Mungo v. LaVallee, 372 F. Supp. 742 (1974) the facts were very similar to those in this case and the arrest of the defendants were

found to be proper.

Subsequent to the Court's ruling, U.S. ex rel. Mungo v. LaVallee was reversed by this Court at 522 F2d 211. Indeed this Court wrote that while the other two cases were distinguishable from the Mungo case, "they were also decided without the benefit of the light of Whitely v. Warden, supra.

Even assuming (without conceeding) the validity of the stop of the vehicle and detention of the defendants, the search of the contents of the cab without a warrant was illegal. In Chimel v California, 395 U.S. 753, 802 n. 9, 89 S. Ct. 2034 (1969) and Coolidge v. New Hampshire, supra, the Court held that a vehicle cannot be searched without a warrant unless the vehicle be quickly movable out of the locality or jurisdiction in which the warrant must be sought. "The word automobile is not a talisman in whose presence the Fourth Amendment fades away and disappears."

In the instant case the defendants were all handcuffed and in a position where they could not exercise any dominion over the contents of the cab. Indeed the police officer stated that he was not afraid that the cab driver was in any way implicated.

In U.S. v. Lonabaugh, 494 F2d 1257, (5th Cir, 1973) the Court held that where the police had effective control over the contents of the suitcases seized and the defendants were

at the time incapable of destroying or concealing the suitcases or their contents, the inherent mobility of the suitcases would not bring them within the language of Carroll v. U.S, 267 U.S. 132 because the mobility was at the time subject to the control of the officers. (See also U.S. v. Frick, 490 F2d 666; U.S. v. Lam Muk Chiu, 522 Fwd 330 (1975).

In U.S. v. Soriano, 482 F2d 489 (5th Cir, 1973) the Court, while approving the seizure of the suitcases due to exigent circumstances and detention pending the issuance of a warrant the facts did not require an immediate warrantless search of its contents. The Court held,

> There is no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the 4th amendment would otherwise require.

In Cupp v. Murphy, 93 S. ct. 2000, 412 U.S. 295 (1973) the Court in reaffirming the doctrine enunciated in Chimel v. California, supra, held that the scope of a warrantless search must be commsurate with the rationale that excepts the search from the warrant requirement. "It must be limited to the area into which an arrestee might reach." The Court further stated that the reason for even allowing the warrantless search is to prevent the arrestee from using any weapons he may have or to keep him from

destroying any evidence within his possession. (See also U.S. v. Jenkins, 496 F2d 57 (2nd Cir., 1974). Absent other factors to the contrary the search cannot be permitted under traditional constitutional tests.

POINT II

THE SEARCH OF 320 14th STREET WAS ILLEGAL AND VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHTS

The decisions of the United States Supreme Court make it clear that only in a few specifically extablished and well defined areas may a warrantless search of a dwelling survive constitutional attack even though the authorities have probable cause to conduct such search. The burden to show the exceptional situation rests upon the Government. Vale v. Louisiana, 399 U.S. 30, 90 S. Ct. 1969 (1970).

The record of the Suppression hearing discloses none of the exceptions to the judicial rule requireing a search of dwelling. Nor the the Government state that the items found were abandoned if view of the testimony that garbage was traditionally left outside the house. There is nothing in the record to indicate that the Defendant intended to abandon the property rather than to exercise dominion or control over it at some future time. Indeed the clothing and weapon were found in a place in which one co-defendant was a tenant and only she, the owner or another cotenant could have entered that part of

building without being a trespasser.

Furthermore, during oral argument the Government conceded that the Appellant had an interest in the items seized of an ownership nature or proprietary interest. In that case appellant clearly had standing to suppress the items seized from the building. Katz v. U.S., 88 S. Ct. 507 (1967). In Simmons v. U.S., 88 S. Ct. 967 (1968) the defendants moved to suppress certain evidence which was found in the basement of a home owned by the mother of a co-defendant. At the time of the search and seizure, the defendants were not present on the premises. In the case at bar, defendant is attempting to suppress certain evidence seized from a basement. In Simmons the Court held,

> The only, or at least the most natural way, in which he could found (sic) standing to object to the admission of the suitcase was to testify that he was its owner.

Likewise, in U.S. vs. Mulligan, 488 F2d 732 (1973) the Court held that "the fact that a person neither has control over the premises nor is present during the search does not preclude hime from being a victim of that search and seizure."

In Brown v. U.S., 93S. Ct. 1565 (1973) the Court again stressed that to establish standing to attack the validity of a search the defendant would have to allege a proprietary

or possessory interest in the goods seized. Clearly from the stipulation entered into on the record that the Defendat appellant had a possessory interest in the goods seized he had standing to objectto the warrantless search at 320 14th Street.

POINT III

THE STATEMENT MADE BY APPELLANT SHOULD HAVE BEEN EXCLUDED DURING TRIAL.

The record is uncontroverted that the statements made by the appellant were made at a time when he was being questioned by Agent Di Laura with respect to the bank robbery. The agent even stated that he felt the questions could bring forth incriminating answers.

In Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1964) the Court wrote,

> Once the warnigns have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning that he wishes to remain silent, the interrogation must cease.

In U.S. v. Tramunti, 513 F2d 1087 (2nd Cir., 1975) the Court held that once the defendant indicatied an unwillingness to continue any answers elicited from her thereafter would be inadmissible and the interrogation should have ceased.

Likewise the Court in Michigan v. Mosley, 18 Cr L. 3017, _____U.S._____(1975) the Supreme Court held that it was permissible to begin to question a defendant after he indicated an unwillingness to speak only where, a) the police had allowed a significant amount of time to pass between questioning, and b) the police issued a fresh set of warnings, and c) the police restricted their questioning during the second interrogation to a crime that had not been a subject of the earlier interrogation. The Court held, "He was thus reminded again that he could remain silent and could consult with a lawyer and was carefully given a full and fair opportunity to exercise these options." Not only were these options not issued to the appellant but it is significant to add that the questioning was by an agent who had not been involved in any way with the previous interrogation. (See also Michigan v. Tucker, 417 U.S. 433).

Likewise, in U.S. v. Collins, 462 F2d 792 (2nd Cir, 1972) cert. den. 409 U.S. 988 (1972) the Court held,

> we are agreed that what Miranda requires is that interrogations must cease until new and adequate warnings have been given and there is a reasonable basis for inferring that the suspect has voluntarily changed his mind.

Nor does the recent decision of this Court in Cobbs v. Warden, _____F2d ____,(2nd Cir, 1975) require a different result. In

that case the defendant indicated a willingness to waive his rights the first time that they were given but indicated he wished to make a call to his attorney. Instead of calling an attorney, however, he decided to call a close relative before making a complete confession. The case clearly does not absolve the Government from having to reissue the Miranda warnings a second time after the defendant wishes not to speak the first time the warnings are given. Indeed the Court specifically notes in Cobbs that at no time did the defendant show a desire to remain silent, an important factor which does not exist in the present case.

Furthermore, if the Court holds that the initial search and stop of the cab was illegal the admissions should likewise be suppressed. In Mungo, supra, the Court held that other leads as a result of the unlawful search and seizure should be prohibited as the products of the search as evidence. "The exclusionary prohibition extends as well to the indirect as the direct products of such invasion." Wong Sun v. U.S., 371 U.S. 471, 83 S. Ct. 407 (1963); Brown v. Illinois, 422 U.S. 590, 95S. Ct. 2254 (1975).

POINT IV

THE COURT SHOULD HAVE CONDUCTED AN EVIDENTIARY HEARING TO DETERMINE PREJUDICE OF THE JURORS HAVING SEEN THE DEFENDANT IN CUSTODY

It is clear that once the defendant raised the question of the possibility of prejudice having been viewed by a number of jurors in custody with handcuffs, the Court should have questioned the jurors as to the possibility of prejudice. In Kennedy v. Cardwell, 487 F2d 101, cert den. 94 S. Ct.1976 (1973, 6th Cir.) the Court paid a great deal of time with the instant question.

> ...it necessarily follows that a criminal defendant is generally entitled to a physical indicia of innocence. Cases where the defendant has been seen for a short time either in the court room or somewhere in the court house by the jury or by one ore more jurors ... is often characterized by a rather cavalier attitude by the Courts that such contntions are frivolous...It must be recognized that some prejudice flows to the defendant in this situation.

In U.S. v. Torres, 519 F2d 723 (2nd Cir., 1975); cert. den. ____U.S.____(1975) the Court, citing Kennedy, supra., the Court under similar circumstances such as the present held, "it ignores reality to say that there can be no prejudice from an incident such as this." In denying the Defendant's motion for a mistrial, the Court paid great defference to the trial Court's questioning the jurors and excusing one juror who stated that seeing the defendant in custody could have affected her judgment. At the least, the trial Court could have questioned the jurors who were alleged to have seen the Defendant to determine the

prejudice if any arising out of the situation.

POINT V

THE COURT SHOULD HAVE CHARGED THE JURY AS TO THE MISSING WITNESS

Prior to the Court's charge, defendant submitted to the Court a proposed charge that the jury could infer that the testimony of Dorothy Goldsmith would have been unfavorable to the Government because of the Government's failure to call her as a witness. (T-502-504). In this case the co-defendant Dorothy Goldsmith stated during the taking of a plea of guilty that she had no knowledge that the defendant was planning a bank robbery (P-20). In addition she stated that she was not present in the house when the plan to rob the bank was formulated approximately five days earlier. (P-28) The statements made at that time were in direct conflict with the statements made on the witness stand by Sandra Soles and Deborah Smith two co-defendants who testified against the appellant during trial. Indeed the conspiracy Count specifically indicated that the individuals had all been present at the house when the plan was formulated. Indeed the statements indicate hostility toward appellant in that at page 24 of the plea Mrs. Goldsmith stated: "No. I think what happened is I got used."

While the instruction is generally not necessary where

where it appears that the testimony will be only cumulative U.S. v. Tyers, 487 F2d 828 (1973, 2nd Cir.), it is clear that if a party has evidence which will illuminate questions in issue and fails to present it, it may be inferred that such evidence would be harmful to his case. U.S. v. Johnson, 467 F2d 804(1st Cir., 1972). The rule holds particular emphasis where one party is hostile to the other. In U.S.v. Deutsch, 451 F2d 98 (1971, 2d Cir), and U.S. v. Stofsky, 527 F2d 237 (2nd Cir, 1975) the Court indicated that a showing of bias may be enough to warrant a charge with respect to the uncalled witness. In the instant case the charge was particularly important in view of the fact that the witness would have testified at least in part directly contrary to the testimony of the Government's two codefendant witnesses which may have seriously shaken their credibility.

POINT VI

THE COURT SHOULD HAVE RULED THAT THE GOVERNMENT WAS FORECLOSED FROM CROSS EXAMINING THE DEFENDANT WITH RESPECT TO HIS PRIOR CRIMINAL RECORD

Prior to trial defendant moved to suppress from cross examination a prior bank robbery conviction for which he was presently on parole. The Court during trial denied the motion (T-496-500). Clearly evidence of such conviction would have negated the credibility of the defendant slightly

at the same time have tended to create a substantial chance of unfair prejudice. US. v. Palumbo, 401 F2d 70 (2nd Cir., 1968); cert. den. 394 U.S. 947.

Certainly in a case such as the instant indictment, it was important to allow the defendant to testify in his own behalf especially where two codefendants had testified against him. To have allowed the Government such cross examination would have highly prejudiced the jury who would certainly find it difficult to limit the influence the impact of defendant's criminal record. Certainly the chance for prejudice was greatly enhanced where the prior offense is similar to the one for which the defendant is on trial. U.S. v. Puco, 453 F2d 539,(2nd Cir.); cert den. 414 U.S. 844. See also 28 U.S.C. Rule 609.

POINT VII

APPELLANT WAS DENIED THE RIGHT TO A SPEEDY TRIAL

As indicated above, defendant was incarcerated for approximately one year prior to the first trial of the indictment. At most a period of three months could be attributed to the delay as a result of the defendant bringing the various necessary motions. In the instant type of crime it would appear that there was the chance of presumptive Prejudice from the defenant's incarceration for the lengthy

period of time. Indeed, it has been held that a delay that would not be presumptively prejudicial as a complex conspiracy may very well be presumptively prejudicial in a simple street crime such as this. Wallace v. Kern, 499 F2d 1345 cert. den. 95 S. Ct. 1329. In U.S. v. Lasker, 481 F2d 229 (2nd cir., 1972) cert den. 415 U.S. 975 (1973) the Court reemphasized the holding in Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182 (1972) in announcing four factors that should be considered in striking a balance. Certainly the length of the delay in the instant case was unnecessarily long under the circumstances. It is difficult to determine the reason for the delay except for the fact that the Court apparently held the defendant's motion to dismiss for the illegal composition of the Grand Jury so that a number of other cases could be joined in the motion and the case disposed of at the same time. The delay was not at the instance of the Appellant and should not inure to his prejudice.

Clearly the defendant demanded a speedy trial as indicated in his motion to dismiss, pro se. It appears, therefore that defendant's motion should have been granted upon the bringing of the pro se motion.

CONCLUSION

For the reasons hereinabove mentioned Appellant's conviction should, in all respects, be reversed.

Respectfully submitted,

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